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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CONNIE CUTINELLO, etc., et al.,

Petitioners,

v.

DOUGLAS L. WHITLEY, etc., et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENTS COUNTY OF DuPAGE AND COUNTY OF McHENRY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I.

WHETHER ILLINOIS' ADOPTION OF A COUNTY GAS TAX TO HELP FUND TRANSPORTATION PROJECTS IN CERTAIN RAPIDLY GROWING AND CONGESTED NORTHEASTERN ILLINOIS COUNTIES IS SUBJECT TO INVALIDATION UNDER THE EQUAL PROTECTION CLAUSE SIMPLY BECAUSE THE CLASSIFICATION IS ALLEGEDLY UNDERINCLUSIVE.

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I.

ILLINOIS' ADOPTION OF A COUNTY GAS TAX TO HELP FUND TRANSPORTATION PROJECTS IN CERTAIN RAPIDLY GROWING AND CONGESTED NORTHEASTERN ILLINOIS COUNTIES IS NOT SUBJECT TO INVALIDATION UNDER THE EQUAL PROTECTION CLAUSE SIMPLY BECAUSE THE CLASSIFICATION IS ALLEGEDLY UNDERINCLUSIVE

A. Standard of Review

This Honorable Court's review of the Illinois legislature's decision to permit certain designated Illinois counties to impose a tax of up to four cents a gallon on gasoline sales is "especially deferential." *Nordlinger v. Hahn*, 112 S.Ct. 2326, 2332 (1992). "[L]egislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Id.* at 2331 (*citing, McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)). In the context of an equal protection challenge to a legislative classification, that presumption can be rebutted only through a showing that the "classification [does not] rationally further a legitimate state interest." *Nordlinger*, 112 S.Ct. at 2331-32. The identification of a "plausible reaso[n]" for the legislative action terminates the court's inquiry. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). In order to defeat a statute on the basis of illegal classification, the plaintiff bears the burden "to negative every conceivable basis which might support" the rationality of the classification. *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2102 (1993) (*citing, Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). "This standard of

review is a paradigm of judicial restraint." *Beach Communications*, 113 S.Ct. at 2101.[1]

B. Petitioners' Contention that the Legislative Classification is Underinclusive does not Render the Classification Arbitrary or Irrational

In light of the very narrow avenue of review, the Illinois Supreme Court had little difficulty identifying a "plausible policy reason" underlying the enabling legislation. *See Nordlinger*, 112 S.Ct. at 2332. Specifically, the Court acknowledged, and indeed, Petitioners do not dispute, that the impact of population growth on transportation and traffic conditions in urban areas constitutes an entirely valid justification for legislative classification (Pet. App. pp. 7-8 (*citing, People ex rel. Curren v. Wood*, 391 Ill. 237, 62 N.E.2d 809 (1945)).

While Petitioners thus concede the propriety of *a* legislative classification in order to fund transportation projects in congested Illinois counties, they have insisted, nonetheless, that the classification consisting of DuPage, Kane and McHenry Counties is not rationally related to the legislature's traffic and population concerns. Initially, Petitioners make much of the legislature's decision to identify the Respondent Counties by name, rather than by a more traditional method, such as size or location (Pet. pp. 3, 6, 8, 13-16, 19 n.6). Nowhere, however, do Petitioners cite any authority invalidating legislation simply because the beneficiaries of the legislation were referred to by name. Indeed, Petitioners' suggestion that classifica-

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[1] Petitioners make no claim that the classification they challenge implicates a "fundamental right" or "inherently suspect characteristic" which would trigger more exacting review. *See Nordlinger*, 112 S.Ct. at 2331.

tion by name amounts to an equal protection violation is undermined by the proposition that the legislature need not articulate or disclose the basis for a classification, and that a classification will be sustained so long as it can be justified under any conceivable rational basis. *See Beach Communications*, 113 S.Ct. at 2102.

Moreover, legislative classification by name is hardly unprecedented, particularly in the present context. In Illinois itself, the legislature created the "Metro East Mass Transit District" (70 ILCS 3610/1) and the "Regional Transportation Authority" (70 ILCS 3615) in response to rapid population growth in two specific areas of the state. The Metro East Mass Transit District was restricted to three designated downstate counties (70 ILCS 3610/2(i)) while the Regional Transportation Authority was limited to six named counties in northeastern Illinois (70 ILCS 3615/1.02). *See Hoogasian v. Regional Transportation Authority*, 317 N.E.2d 534 (Ill. 1974) (upholding constitutionality of statute). Other states have similarly rejected the notion that a legislative classification violates principles of equal protection simply because the legislature designated by name the county to be benefitted. *See, e.g., Atlantic City Parking Auth. v. Atlantic County*, 434 A.2d 676 (N.J. 1981).

Turning from form to substance, the gist of Petitioners' contention is that the classification violates principles of equal protection primarily because Lake and Will Counties were excluded from the legislation. At the same time, Petitioners repeatedly and vehemently denigrate the Illinois Supreme Court for rejecting that contention on the basis of "unproven assertion[s]", "intellectual what-if[s]", and "idle speculation" (Pet. p. 5).

Petitioners' misplaced ire is best explained by their refusal to grasp the proper role of the judiciary and the

nature of its task in reviewing a legislative classification against an equal protection or special legislation challenge. As repeatedly emphasized by this Court, the judiciary's task is simply to ensure that a particular classification is not arbitrary, or irrational; it need not determine that the classification was mathematically precise or perfectly inclusive. *See, e.g., Beach Communications*, 113 S.Ct. 2101-02 (1993). Moreover, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 2102. Accordingly, any reliance by the Illinois Supreme Court upon "unproven assertions" and "speculation", would have been entirely consistent with the proper scope of its judicial function, so long, of course, as such speculation was rational.

In this case, the position taken by Petitioners, when considered in conjunction with the information they provided to the lower courts, defeats any suggestion that the classification they challenge is irrational or arbitrary. Indeed, in assessing whether the classification appeared rational, the State Supreme Court correctly noted that even the "Plaintiffs do not dispute the rapid population growth in the northeastern part of the state" (Pet. App. p. 10). The Court similarly pointed out that Petitioners' own evidence showed that "the Counties rank high in terms of urban congestion" (Pet. App. pp. 11-12). In light of Petitioners' own submissions, and the stringent limits on its scope of review, the Illinois Supreme Court properly resisted Petitioners' attempts to embroil it in exacting fact-finding on whether DuPage, McHenry, and Kane Counties were, in fact, the *only* counties deserving of the additional tax.

A proper understanding of the appropriate scope of review similarly dispels Petitioners' oft repeated contention that

the Illinois Supreme Court improperly relied on an affidavit concerning population growth rates in various Illinois counties which was proffered by Respondents in the Circuit Court of Cook County (Pet. pp. 4-6, 8, 21-27). That affidavit, as Petitioners correctly point out, was stricken by the Circuit Court because it failed to satisfy the State of Illinois' standards governing admissibility of evidence. Indeed, even the State Supreme Court noted that the affidavit contained "unauthenticated statistics" (Pet. App. p. 10).

Whether the affidavit was admissible as evidence was entirely irrelevant, however, to the Court's task. Because "a legislative choice is not subject to courtroom fact-finding" (*Beach Communications*, 113 S.Ct. at 2102), the classification could not properly be struck down simply because the Counties failed to present evidence in support of the classification's reasonableness. As the lower Court reasoned, "it is plaintiffs' burden to show that a classification is unreasonable, not the Counties' burden to show that the classification is reasonable" (Pet. App. p. 11).

Moreover, the Illinois Supreme Court's opinion does not suggest that the justices relied on the previously stricken affidavit in concluding the classification survived deferential scrutiny. As indicated above, the Court was most persuaded by the absence of any challenge to the statute's underlying purpose and by Petitioners' concession that each of the Respondent Counties shared common characteristics warranting their inclusion in the chosen class.

Even if it did consider the affidavit, the State Supreme Court could not legitimately be faulted for according Mr. Fry's conclusions whatever weight it deemed appropriate regardless of whether his affidavit satisfied standards of admissibility. In assessing whether the classification was

"rational", the Court could conceivably have relied on a virtually limitless array of sources of information including common sense, life experiences, judicial notice, prior cases, suggestions by counsel, and proffered evidence, whether admissible under traditional evidentiary standards or otherwise. Indeed, in *Beach Communications, Inc.*, the rational basis for a disputed classification was first suggested by former D.C. Circuit Court of Appeals Chief Judge Abner Mikva in a concurrence based wholly upon his own perceptions of the cable television industry. 113 S.Ct. at 2103. *See also Beach Communications, Inc. v. F.C.C.*, 959 F.2d 975, 988-91 (D.C. Cir. 1992). In espousing his theory, Chief Judge Mikva reasoned that the presumption of a classification's validity may be "sustained by justifications in or out of the record" because equal protection is satisfied so long as "any state of facts reasonably *may be conceived* to justify" the distinction. *Id.* at 989 (internal citations omitted) (emphasis in original). That being the case, it is inconsistent for Petitioners to seek reversal in this case because the perceptions of some or all of the lower court justices may have been influenced by information contained in the affidavit.

The broad deference accorded the legislature in the context of an equal protection challenge to state taxation statutes does not, as declared by Petitioners, mean that "*no legislation could ever be invalidated*" under the Illinois Supreme Court's "twisted" view of the equal protection clause (Pet. p. 4) (emphasis in original). For example, a showing of irrationality or arbitrariness could conceivably be made through an allegation that one or more of the beneficiaries of a piece of legislation obviously lacks key characteristics consistent with the justifications advanced in support of the legislation. In the present context, an allegation that one or more of the Respondent

counties was, in fact, one of the slower growing, and lesser congested counties in northeast Illinois, as opposed to one of the fastest growing and most congested, would presumably be sufficient to raise questions as to the rationality of the classification.

Petitioners do not, and cannot contend, that any of the classified counties lack population or congestion problems of a magnitude warranting their inclusion in the class of counties to be benefitted through the gas tax. Rather, Petitioners contend that their statistics and studies suggest that certain other counties should also have been included in the class. Specifically, Petitioners rely heavily on an Illinois Department of Transportation report entitled *Lifelines to the Economy*, which concluded that the ideal class of counties to be benefitted by a gas tax would include Lake and Will Counties in addition to DuPage, McHenry and Kane Counties in northeastern Illinois (Pet. pp. 7, 16-17). The report also opines that the classification should include St. Clair and Madison Counties, both of which are located in the far southern part of the state (Pet. pp. 7, 16-17).

Petitioners' attempt to substitute the suggestions of the Illinois Department of Transportation for the will of the Illinois legislature threatens to turn the legislative process on its head, and convert the judiciary into a super-legislature. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Legislatures are not bound to adopt as gospel the suggestions they receive from state agencies or from any other source under threat that a court may later invalidate legislation if it does not mirror the recommendations. Clearly the Illinois Department of Transportation may have an interest in securing funds for a broader class of counties than may be feasible from the far broader perspective employed by a legislative body.

Moreover, as indicated above, the *Lifelines* study relied on by Petitioners actually supports the Illinois Supreme Court's conclusion that the challenged classification was rationally based. According to Petitioners, the report concluded that, out of one hundred and one (101) Illinois counties, only seven should be given the option to impose a gas tax, and three of those seven were the Counties ultimately chosen by the legislature (Pet. pp. 16-17). Utilizing Petitioners' own "evidence", therefore, the General Assembly could have easily concluded that the named counties were an appropriate class in light of the purposes of the enabling legislation.

Petitioners put a different spin on the *Lifelines* study, suggesting that, because it recommended the inclusion of particularly Lake and, to a lesser extent, Will Counties, any classification exempting those counties must be irrational. Once again, however, Petitioners' own "evidence" suggests a rational basis for the exclusion of Lake County. Specifically, Petitioners point to statements made by Lake County legislators supporting the enabling statute expressly "*because it excluded* Lake County (Pet. p. 18) (emphasis in original). Notably, one of those representatives explained that he wanted Lake County exempted because "we're on the border of Wisconsin" (Pet. p. 18, *citing House Transcript, Statement of Representative John Matijevich*, June 30, 1987). Matijevich's statement would suggest a rational basis for exempting Lake County, that being the concern that drivers might fuel up across the state line in order to avoid the additional tax. Accordingly, it would be quite rational to conclude that, at least in Lake County, any additional revenue generated by the gas tax would be diluted by the loss of gas customers, and that Lake County gas distributors might, therefore, be more damaged by the tax than those in the Respondent Counties.

Finally, to the extent Petitioners insist the classification is irrational or arbitrary because Will County was excluded, their contention is misdirected. As indicated above, "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Nordlinger*, 112 S.Ct. 2326 at 2332 (*quoting*, *Williams v. Vermont*, 472 U.S. 14, 22 (1985). Moreover, as aptly noted by the Illinois Supreme Court, "[c]lassification 'requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some point is a matter for legislative, rather than judicial, consideration' " (Pet. App. p. 10 (*quoting*, *F.C.C. v. Beach Communications*, 113 S.Ct. at 2102)). Accordingly, the classification cannot be invalidated simply because another county or other counties would also have benefitted from inclusion. If Petitioners wish to have Will County included in the enabling legislation, that request should be addressed to the legislature. In that respect, it is noteworthy that Petitioners have never contended that any representative of Lake or Will Counties, or any other excluded County, have complained about not being included in the enabling legislation.

CONCLUSION

The Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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